Public Finance Bhd v Ehwan bin Saring

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12-58-1993
MOHD GHAZALI J
19 SEPTEMBER 1995

Contract *— Void contract — Impossibility — Hire-purchase of vehicle — Vehicle seized by custom after agreement was executed — Impossible for owner to pass good title — Whether hire-purchase agreement void — Whether should return deposit to hirer — Contracts Act 1950 s 57(2) & s 66*

Hire-Purchase *— Hire-purchase agreement — Implied condition that owner had right to sell goods at the time when property was to pass under s 7(1)(b) of Hire-Purchase Act 1967 — Vehicle seized by customs after agreement was executed — Owner could not pass good title to hirer — Whether owner in breach of s 7(1)(b) — Whether implied condition that owner had good title when he entered into agreement preserved by Act — Whether implied condition could be excluded by letter of indemnity — Whether implied conditions and warranties under s 7(1) applicable to second-hand goods — Hire-Purchase Act 1967 s 7(1)(b) & (4)*

Words and Phrases *— 'At the time when the property is to pass' — Hire-Purchase Act 1967 s 7(1)(b)*

The respondent purchased a motor car ('the vehicle') from T for RM82,000. The respondent paid a sum of RM57,000 out of which RM40,517.97 was paid to T, and RM16,482.03 to Public Finance Bhd ('the appellants'), for the purpose of settling T's outstanding account with the appellants. For the balance of RM25,000, the respondent (as hirer) entered into a hire-purchase agreement ('the agreement') with the appellants (as owners) wherein that sum was advanced by the appellants to the respondent to pay T the balance of the purchase price. The respondent had also signed a letter of indemnity whereby he agreed to indemnify the appellants against all losses in the event the appellants lost the title and possession of the vehicle. Six weeks after the agreement was executed, the vehicle was seized by the Customs and Excise Department for an alleged offence. The respondent filed an action in the sessions court for the return of the RM57,000 and a further sum which had been expended on repairs and other charges on the vehicle. He contended that, by reason of the seizure, the appellants had breached the implied warranties and conditions provided for under s 7(1) of the Hire-Purchase Act 1967 ('the Act'), and that there had been a total failure of consideration. Relying on the provisions of the letter of indemnity, the appellants counterclaimed for payment of the sum of RM25,294.01. The appellants contended that: (i) there was no breach of s 7(1)(b) of the Act, as the implied condition that the owner should have a right to sell the goods at the time when the property was to pass under the section, only arose when the last instalment had been paid, which was not the case here; (ii) s 7(1)(b) was not applicable to second-hand vehicle; and (iii) in any event, the implied condition under s 7(1)(b) had been precluded by the letter of

indemnity. The appellants also argued that the letter was not part of the hire-purchase agreement, and therefore did not contravene s 34 of the Act. The sessions court allowed the respondent's claim and dismissed the appellants' counterclaim. The appellants appealed.

Held, dismissing the appeal:

(1) The conduct and actions of the appellants showed that they had held themselves out as the owners of the vehicle at the time the agreement was entered into, and that they were capable of giving a good title to the respondent whenever he might choose to end the hiring by paying the balance due. However, as the vehicle was seized by the customs soon after the agreement was executed and had not been returned to either party since, it had become impossible for the appellants to pass a good title to the respondent. Pursuant to s 57(2) of the Contracts Act 1950, the agreement had become void, and the appellants were obliged to return the RM57,000 to the respondent under s 66 of the Contract Act 1950 (see pp 344C–G and 345I); *Ahmad Ismail v Malayan Motor Co & Anor* [1973] 2 MLJ 66 distinguished.

(2) Section 7(4) of the Act preserves the implied condition at common law whereby the owner had to have a good title when he entered into the hire-purchase agreement, and not when the final payment was made. The phrase 'at the time when the property is to pass' in s 7(1)(b) means at the time when a hirer decides to pay all sums due under a hire-purchase agreement. A breach of s 7(1)(b) amounts to a breach which goes to the root of the agreement, entitling a hirer to recover the amount already paid by him. The Act does not differentiate between new and second-hand goods as far as ownership is concerned. It also does not provide that the implied condition and warranties under s 7(1) do not apply to second-hand goods. An implied condition that the owner shall have good title to pass cannot be excluded from a hire-purchase agreement (see pp 345G, 346C–D and 348E–G); *Karflex Ltd v Poole* [1933] 2 KB 251 followed.

(3) The letter of indemnity formed part of the agreement. The letter, which purported to exclude provisions of the Act which was meant to provide protection to hirers, contravened the Act and was void under s 34(a), (b) and (g) of the Act. There had been a total failure of consideration, and the appellants could not claim that the implied condition as to title provided for under s 7(1)(b) of the Act was not applicable (see p 349C–G); *Rowland v Divall* [1923] 2 KB 500 followed.

[Bahasa Malaysia summary

Penentang telah membeli sebuah kereta ('kenderaan tersebut') daripada T untuk RM82,000. Penentang telah membayar RM57,000, di mana RM40,517.97 telah dibayar kepada T, dan RM16,482.03 kepada Public Bank Bhd ('perayu') bagi tujuan menyelesaikan baki akaun T dengan perayu. Untuk baki RM25,000 pula, penentang

(sebagai penyewa) telah mengikat satu perjanjian sewa beli ('perjanjian itu') dengan perayu (sebagai pemunya) di mana jumlah itu didahulukan oleh perayu kepada penentang untuk membayar T baki harga belian tersebut. Penentang juga telah menandatangani sepucuk surat tanggung rugi di mana dia bersetuju untuk menanggung rugi perayu terhadap semua kerugian, jika perayu kehilangan hakmilik dan milikan kenderaan itu. Enam minggu selepas perjanjian itu dilsempurnakan, kenderaan tersebut dirampas oleh Jabatan Kastam dan Eksais atas satu kesalahan yang dikatakan. Penentang pun memfailkan satu tindakan di mahkamah sesyen untuk pengembalian RM57,000 itu dan satu jumlah lanjut yang telah dibelanjakan atas kerja memperbaiki dan lain-lain caj ke atas kenderaan itu. Beliau berhujah bahawa, akibat rampasan itu, perayu telah mengingkari waranti dan syarat tersirat yang diperuntukkan di bawah s 7(1) Akta Sewa Beli 1967 ('Akta tersebut'), dan bahawa terdapat kegagalan balasan sepenuh. Bergantung kepada peruntukan surat tanggung rugi itu, perayu menuntut balas untuk bayaran sejumlah RM25,294.01. Perayu berhujah bahawa: (i) tidak terdapat perlanggaran s 7(1)(b) Akta tersebut kerana syarat tersirat bahawa pemunya berhak menjual barang pada masa apabila harta barang itu harus bertukar tangan cuma timbul apabila ansuran terakhir telah dibayar, dan ini tidak berlaku dalam kes ini; (ii) s 7(1)(b) tidak terpakai kerana kenderaan tersebut merupakan kenderaan terpakai; dan (iii) walau bagaimanapun, syarat tersirat itu telah diketepikan oleh surat tanggung rugi tersebut. Perayu juga menghujah bahawa surat tersebut bukan sebahagian daripada perjanjian, dan maka, ia tidak melanggar s 34 Akta tersebut. Mahkamah sesyen membenarkan tuntutan penentang dan menolak tuntutan balas perayu. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Kelakuan dan tindakan perayu menunjukkan bahawa perayu telah berlagak sebagai pemunya kenderaan tersebut apabila perjanjian itu diikat, and bahawa mereka mampu memberikan hakmilik yang baik kepada penentang apabila penentang memilih untuk menamatkan penyewaan itu dengan membuat bayaran baki yang kena dibayar. Walau bagaimanapun, oleh kerana kenderaan itu dirampas oleh pihak kastam tidak lama selepas perjanjian itu dilaksanakan dan tidak dikembalikan kepada kedua-dua pihak sejak itu, adalah mustahil bagi perayu untuk memindahkan hakmilik yang sempurna kepada penentang. Oleh itu, mengikut s 57(2) Akta Kontrak 1950, perjanjian itu telah menjadi terbatal, dan perayu terpaksa mengembalikan jumlah RM57,000 kepada penentang di bawah s 66 Akta Kontrak 1950 (lihat ms 344C–G dan 345I); *Ahmad Ismail v Malayan Motor Co & Anor* [1973] 2 MLJ 66 dibeza.

(2) Seksyen 7(4) Akta tersebut telah mengekalkan syarat tersirat mengikut common law, di mana pemunya mestilah memiliki hakmilik yang sempurna apabila dia mengikat suatu perjanjian sewa beli, dan bukan apabila bayaran akhir dibuat. Frasa 'pada masa apabila harta harus bertukar tangan' dalam s 7(1)(b)

bermakna pada masa apabila penyewa membuat keputusan membayar kesemua jumlah yang kena dibayar di bawah suatu perjanjian sewa beli. Perlanggaran s 7(1)(b) merupakan satu perlanggaran yang menyentuh asas perjanjian tersebut, dan ini memberi hak kepada penyewa untuk mendapatkan jumlah yang telah dibayar olehnya semula. Akta itu tidak membuat perbezaan di antara barangan baru dan terpakai, sejauh mana ia melibatkan pemunyaan. Ia juga tidak memperuntukkan bahawa syarat dan waranti tersirat di bawah s 7(1) tidak terpakai terhadap barangan terpakai. Satu syarat tersirat bahawa pemunya akan mempunyai hakmilik yang baik untuk dipindahmilik tidak boleh diketepikan daripada satu perjanjian sewa beli (lihat ms 345G, 346C–D dan 348E–G); *Karflex Ltd v Poole* [1933] 2 KB 251 diikut.

(3) Surat tanggung rugi itu membentuk sebahagian daripada perjanjian tersebut. Surat itu, yang nampaknya telah mengenepikan peruntukan Akta tersebut yang bertujuan untuk memberikan perlindungan kepada penyewa, telah melanggar Akta tersebut dan adalah tak sah di bawah s 34(a), (b) dan (g) Akta tersebut. Terdapat juga kegagalan balasan sepenuh, dan perayu tidak boleh menuntut bahawa syarat tersirat tentang hakmilik yang diperuntukkan di bawah s 7(1)(b) Akta itu tidak terpakai (lihat ms 349C–G); *Rowland v Divall* [1923] 2 KB 500 diikut.]

[*Editorial Note*: The appellants have applied for leave to appeal to the Court of Appeal vide Civil Appeal No D–043–627 of 95.]

Notes

For cases on void contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2295–2310.

For cases on hire purchase agreements, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2332–2357.

Cases referred to

Ahmad Ismail v Malayan Motor Co & Anor [1973] 2 MLJ 66 (FC); [1973] 1 MLJ 117 (HC)

Goh Yew Chew & Anor v Soh Kian Tee [1970] 1 MLJ 138

Karflex Ltd v Poole [1933] 2 KB 251; [1933] All ER Rep 40

Richards v Alliance Acceptance Co Ltd [1976] 2 NSWLR 96

Rowland v Divall [1923] 2 KB 500

Warman v Southern Counties Car Finance Corp Ltd [1949] 2 KB 576; [1949] 1 All ER 711

Legislation referred to

Contracts Act 1950 ss 24(b), 57(2), 66

Customs Act 1967 ss 114, 128(1), 135(1)(d)

Hire-Purchase Act 1967 ss 6(1), 7(1)(b), (c), (3), (4), 13(1), 34

Hire-Purchase Act 1960 [NSW] s 5(5)

A *Low Kim Leng* (*Soo Thien Ming & Shahrizat*) for the appellants.
Teh Poh Teik (*Teh Poh Teik & Co*) for the respondent.

Cur Adv Vult

B **Mohd Ghazali J**: This is an appeal against the decision of the sessions court, Johor Bahru wherein the learned sessions court judge allowed the respondent's claim for the sum of RM57,000 together with interest and costs in respect of breach of condition and warranties arising out of a hire-purchase agreement with regard to the purchase of a motor car, dated 27 March 1991, entered into between the respondent (as hirer) and the C appellants (as owners), and dismissed the appellants' counterclaim for a sum of RM25,294.01 being the sum of money paid by the appellants to purchase the said motor car from its previous owner.

The facts of the case are as follows:

The respondent purchased a motor car bearing registration No JBX D 2923 ('the vehicle') from one Tan Chin Cheng ('Tan') at an agreed price of RM82,000. The respondent paid a sum of RM57,000 out of which RM40,517.97 was paid to Tan, and the balance of RM16,482.03 to the appellants, a finance company, for the purpose of settling Tan's outstanding account with the appellants as the said car was still under finance by the appellants. For the balance of RM25,000, the respondent entered into a E hire-purchase agreement ('the agreement') with the appellants, on 27 March 1991, wherein that sum was advanced by the appellants to pay Tan the balance of the purchase price. In the agreement, the appellants is described as 'the owner' and the respondent as 'the hirer'. The agreement referred to the said amount of RM57,000, which was earlier paid by the respondent, F as being the deposit, and that the amount payable by the respondent to the appellants under the agreement is RM28,250 (inclusive of term charges). It was also stated in the agreement that the hiring shall be deemed to have commenced on 27 March 1991, and that the hirer shall pay 23 monthly instalments of RM1,178 each, and a final instalment of RM1,156.

G However, on 8 May 1991, the vehicle was seized by the Customs and Excise Department for an alleged offence under s 135(1)(d) of the Customs Act 1967 ('the Customs Act'). Section 135(1)(d) reads:

> Whoever ... knowingly harbours, keeps, conceals or is in possession of, or permits, suffers, causes or procures to be harboured, kept or concealed, any uncustomed or prohibited goods ... shall be guilty of an offence ...

H The evidence adduced at the trial shows that on that date, the customs had issued a notice of seizure (p 94 of the appeal record) pursuant to s 114 of the Customs Act 1967 to the respondent, and informed him that if he wish to claim that the vehicle is not liable for forfeiture, he must give notice to the customs and make a claim within one month from the I date of seizure, failing which the vehicle will be deemed to be forfeited under the provision of s 128(1) of the Customs Act 1967. Section 128(1) reads:

> If there be no prosecution with regard to any goods seized under this Act, such goods ... shall be taken and deemed to be forfeited at the expiration of

> one calendar month from the date of the seizure of the goods unless ... a claim thereto is made before that date in the manner hereinafter set forth.

By a letter dated 13 May 1991, the appellants gave instructions to their solicitors to write to 'the relevant authorities' for the return of the vehicle, as they 'are the hire-purchase owners of the said vehicle' (see p 100 of the record of appeal), and by a letter dated 19 May 1991, their solicitors wrote to the customs to inform that their client, the appellants, are the lawful owners of the vehicle and requested for its return. The customs replied on 20 July 1991, informing the appellants' solicitors that the matter was still under investigation for a suspected offence relating to the vehicle's import permit and/or duty.

Subsequently, by a summons dated 27 July 1991, the respondent filed an action in the sessions court, Johor Bahru, against the appellants claiming that by reason of the seizure by the customs, the appellants have breached s 7(1) of the Hire-Purchase Act 1967 ('the Act'). Section 7(1) reads:

> In every hire-purchase agreement there shall be —
>
> (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods;
>
> (b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass; and
>
> (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass.

The respondent has also pleaded that there is a total failure of consideration. The respondent's claim is for the return of the RM57,000 which he has paid towards the purchase price of the vehicle, and also for the sum of RM4,935.10 which he has expended for repairs towards the vehicle, its insurance premium, the transfer fee, and certain charges imposed by the appellants, making it a total of RM61,935.10.

The appellants counterclaimed. They pleaded that on the same day that the agreement was entered into, the respondent had also signed a letter of indemnity wherein he agreed, inter alia, to indemnify the appellants against all losses, damages including liquidated damages in the event the appellants loses the title and possession of the vehicle. The damages as quantified by the appellants was RM25,294.01 inclusive of costs and interest. On 27 October 1993, the learned sessions court judge allowed the respondent's claim for the return of the RM57,000 with interest and costs, and dismissed the appellants' counterclaim. The appellants appealed.

It is not disputed that the respondent has paid a total sum of RM57,000 for the vehicle, viz by way of a direct payment of RM40,517.97 to Tan and by way of a direct payment of RM16,482.03 to the appellants, to settle Tan's outstanding account with the appellants as the vehicle was still under finance by the appellants when the respondent purchased it.

At the trial, the appellants insisted that it was the respondent who approached them for a loan of RM25,000 to pay for the balance price of the vehicle in the form of a hire purchase and upon approval of his

application, they paid Tan the balance and that since they are now the owner of the vehicle, they are entitled to claim the RM25,000 from the respondent. In his submission, counsel for the appellants argued that there was no breach of s 7(1)(b) and (c) of Act as claimed by the respondent, as the words 'at the time when the property is to pass' found in those paragraphs denote that such 'time' only arises when a hirer has made his last payment under a hire-purchase agreement and that in the instant case, such 'time' has not arisen as the last payment was not then due. To support his argument, he referred to the case of *Ahmad Ismail v Malayan Motor Co & Anor* [1973] 2 MLJ 66.

In that case, the facts show that the first defendant was a second-hand car dealer whilst the second defendant was a finance company. On 18 December 1969, the plaintiff decided to buy a second-hand car for RM4,900 from the first defendant; he traded in his car and received a credit of RM1,200 and paid the first defendant a sum of RM1,000. As he could not pay the balance of RM2,700, he entered into a hire-purchase agreement with the second defendant under which the latter was referred to as the 'owners' and the plaintiff as the 'hirer'. Under the said agreement, the plaintiff was to pay the second defendant monthly instalments of RM150 commencing 19 January 1970. He paid four monthly instalments. However, he stopped doing so when the car was detained by the police on 30 April 1970 on suspicion that it had been stolen. During the course of police investigations, the police offered to return the car to the plaintiff subject to certain conditions but the plaintiff refused to accept the offer. On 4 July 1970, the plaintiff terminated the hire-purchase agreement and on 10 September 1970, sued both defendants for breach of contract. He alleged that there has been a breach of the condition implied by the then s 6(1)(b) of the Act which reads:

> In every hire-purchase agreement there shall be an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass.

Meanwhile, on 31 October 1970, the second defendant took possession of the car from the police subject to certain conditions, inter alia, that they should not offer the car for hire or sale to anyone and that they should not sell or transfer it without the leave of the court. Finally, the police cancelled the conditions to which the car had been returned to the second defendant.

The sessions court dismissed the plaintiff's claim against both defendants and his appeal to the High Court was also dismissed (see [1973] 1 MLJ 117). He then appealed to the Federal Court — Suffian FJ said ([1973] 2 MLJ 66 at p 67) that from the language of the hire-purchase agreement the first defendant, ie the car dealer, faded out of the picture, and the contract that remained was between the plaintiff and the second defendant, ie the finance company, and accordingly the plaintiff has no claim against the car dealer. With regard to the action against the finance company, the plaintiff contended as follows:

(a) that under s 6(1)(b) there was an implied condition on the part of the finance company that they would have a right to sell the car at the time when the property in it was to pass;

(b) that the property in it was to pass after the final instalment had been paid or after the plaintiff (if he had opted to do so) has given notice under s 13(1) before the date for the final instalment that he intended to complete the purchase by paying the net balance due under the agreement; and

(c) that when the police seized the car as a suspected stolen car there was no actual breach by them of the implied condition as provided for under the said s 6(1), but nevertheless, there was anticipatory breach by them, entitling the plaintiff to rescind the agreement and sue for damages for breach.

Suffian FJ said (at p 68):

> With respect we cannot accept the plaintiff's arguments. In our view, the principle enunciated in *Universal Cargo Carriers* [1957] 1 All ER 70, does not apply. The principle there is that anticipatory breach of a contract can occur only if there has been some act by the *defendant* himself to make it obvious that he has renounced his liabilities under the contract or that it has become impossible for him to perform. Here, on the other hand, there has been no such act by the second defendant. If performance has been made impossible it was not because of their act but because of the intervention of a third party, the police.

In the instant case, counsel for the appellants insisted that similarly, the implied condition and warranty provided for under s 7(1)(b) and (c), respectively, of the Act are not applicable. He argued that those provisions contemplate that the owner shall have a right to sell the goods or that the goods shall be free from any charge or encumbrance 'at the time when the property is to pass'. He insisted that 'the time when the property is to pass' under a hire-purchase agreement is when you have made your last instalment payment — in the instant case, the respondent has not made his last payment and hence the implied condition or warranty is not applicable. He agreed that at common law, we look at the time when we enter into the contract to determine whether a person is the owner of the property at the time of hiring, ie on the date the agreement was entered into, but contended that under the Act, we look at the time when the property is to pass, i e when the hirer has paid the last instalment. He contended that although these common law rights have been preserved by s 7(4) of the Act, they can still be excluded by the terms under a hire-purchase agreement or other documents. Section 7(4) reads:

> Nothing in this section shall prejudice the operation of any other written law or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement.

He pointed out that in the instant case, these common law rights have been excluded by virtue of cl 4 of the agreement (see p 108 of the appeal record) which specifically excludes warranties in respect of second-hand vehicles. Clause 4 reads:

> The owner gives no warranty whatsoever in respect of the goods as to description fitness roadworthiness repair or otherwise other than in the case of new goods only those necessarily implied by the Act nor shall the owner be responsible for any delay in delivery.

To support his argument that common law rights can be excluded from a hire-purchase agreement, he referred to the case of *Richards v Alliance Acceptance Co Ltd & Anor* [1976] 2 NSWLR 96. In that case, the appellants (the hirer) entered into a hire-purchase agreement with a finance company (the owner) whereby the appellants hired a prime mover and semi-trailer purchased from a dealer. After paying the deposit but before paying the first instalment due under the agreement, the appellants formed a belief in consequence of police inquiries, that the semi-trailer was stolen. He then told the finance company that he would pay nothing further until the question of the title was cleared up. Without consulting the finance company returned the prime mover to the dealer and surrendered the semi-trailer to the police. The appellants then purported to rescind the agreement and sued the finance company for the return of the deposit. The finance company counterclaimed for the first instalment of hire. Section 5(5) of the Hire-Purchase Act 1960 of New South Wales (which is the equivalent of s 7(4) of our Act) provides:

> Nothing in this section prejudices in any way any other enactment or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement.

Samuels JA said (at p 101):

> In a hire-purchase agreement under the Hire-Purchase Act 1960 ('the Act'), the hirer derives rights both from the Act and from the common law. At common law, it was an implied condition of the agreement that the bailor (the respondent) was the owner of the goods at the time of the delivery: *Karflex Ltd v Poole* [1933] All ER Rep 40.
>
> But the Act has reduced the breadth of this protection, because of the terms of s 5(1)(b) which provides that in every hire-purchase agreement there shall be ' ... an implied condition on the part of the owner that he will have a right to sell the goods at the time when the property is to pass ...'
>
> However, conditions and warranties which might be implied at common law are preserved by the terms of s 5(5). But such stipulations are vulnerable to exclusion by the terms of the hire-purchase agreement itself: s 36(1)(i). Section 36(1)(i) reads —
>
> 'Any provision in any agreement or other document whereby —
>
> (i) except as expressly provided by this Act the operation of any provision of this Act is excluded, modified, or restricted, is void.'
>
> Hence, in the present case, the appellants would have been entitled to invoke the implied condition as to title at common law preserved by s 5(5), had it not been for the presence in the agreement of the exclusion contained in cl 8(b), which was in those words 'So far as the law provides all other conditions and warranties which could be implied in this agreement are also negatived and excluded.
>
> It was, indeed, common ground that the existence of cl 8(b) was fatal to any condition which might otherwise have been derived from *Poole*'s case ...

Counsel then submitted that the respondent has also signed the letter of indemnity which he argues is a very good defence to the respondent's averment that there shall be an implied warranty that the respondent shall have and enjoy quiet possession of the vehicle as provided for under

s 7(1)(a) of the Act. He argued that this letter of indemnity is only meant for second-hand vehicles, and that by virtue of cl 3 therein, the respondent is estopped from making this claim. The letter of indemnity, which was prepared by the appellants, addressed to the appellants, and signed by the respondent, reads:

> Dear sirs,
>
> Secondhand motor vehicle:
> Make and model: Mercedes Benz 200
> Registration no: JBX 2923
> Engine no: 10298020751619
> Chassis no: WDB1232232A289139
> Present registered owner: Tan Chin Cheng
> Ownership claims as legal owner by: Tan Chin Cheng
>
> I hereby request you to purchase the above-mentioned vehicle ('the vehicle') for the purpose of letting the same to me on hire-purchase.
>
> I confirm that I have personally verified the particulars in respect of the vehicle and I hereby warrant you the truth and correctness of the particulars as set out above. In particular, I have satisfied myself that the legal owner of the vehicle is as set out above and the present registered owner at the registry of motor vehicles is as set out above and that the vehicle is free from any encumbrances or ownership claim as set out above.
>
> In consideration of your agreeing at my request to purchase the vehicle from the legal owner and the present registered owner as set out above for the purpose of letting the vehicle to me on hire-purchase thereafter, I hereby agree, covenant and undertake as follows:
>
> (i) to indemnify you and to keep you indemnified against all actions, claims, loss, damages and costs which you may sustain as a result of any party other than the present registered owner and the legal owner claiming title to or any interest in the vehicle including your solicitor's fees on a solicitor and client basis in defending any such claim; and
>
> (ii) in the event of your losing title and possession of the vehicle to any party other than the above-mentioned legal owner, and on written demand by you, to pay to you by way of agreed liquidated damages the unpaid balance of the total hire-purchase price less unpaid terms charges under the hire-purchase agreement to be entered between us in respect of the vehicle.

Counsel for the appellants also submitted that this letter of indemnity, which is only meant for second-hand vehicles, does not contravene s 34(g) of the Act which provides:

> Any provision in any hire-purchase agreement whereby —
>
> ...
>
> (g) except as expressly provided by this Act, the operation of any provision of this Act is excluded, modified or restricted,
>
> shall be void and of no effect.

Counsel further argued that s 34 only applies to a hire-purchase agreement and does not at all apply to other documents, meaning which, he is contending that the letter of indemnity is not part of the agreement.

With regard to the appellants' counterclaim, counsel argued that the appellants has suffered a loss in that they have paid a sum of RM25,000 to Tan being the balance owing under the hire-purchase account pursuant to the letter of indemnity signed by the respondent. He submitted that the undertaking by the respondent in that letter of indemnity would entitle the appellants to make the counterclaim. In conclusion, he urged that the appeal be allowed and that judgment in the appellant's favour be given in respect of the counterclaim based upon the letter of indemnity.

In opposing the appeal, counsel for the respondent submitted that when the respondent and the appellants entered into the agreement, Tan faded out of the picture because he had assigned his rights with regard to the vehicle to the appellants. He referred to a letter (see p 102 of the appeal record) which was introduced in evidence wherein Tan had written to the appellants as follows:

> I/We hereby declare that I/we are the absolute owner without encumbrances of any kind of the above vehicle and I/we transfer all my/our rights, title and interest in the said vehicle to you as the owner and Ehwan bin Saring of 37, Jalan Pinggiran Ukay, Jalan Ulu Kelang, Ampang, Selangor as hirer in respect of Ehwan Bin Saring obtaining a hire-purchase loan from Messrs Public Finance Bhd.
>
> The following consideration shall be treated as full payment of the said vehicle.
>
> | | |
> |---|---|
> | Deposit paid by Ehwan Bin Saring | RM 57,000 |
> | Balance to be paid by Public Finance Bhd | RM 25,000 |
> | Total consideration | RM 82,000 |
>
> I/We hereby confirm that I/We have already received from Ehsan Bin Saring the deposit sum of RM57,000 (Ringgit: Fifty seven thousand only).
>
> I/We further undertake to fully indemnify Public Finance Bhd against all losses incurred in consequence resulting from the above stated transaction and to refund all monies should registration of the said vehicle be refused by the Registrar and Inspector of motor vehicles for any reason whatsoever.

Counsel for the respondent submitted that upon paying Tan the balance of RM25,000, the appellants became the owner of the vehicle. He also pointed out that the fact that the appellants claims to be the owner of the vehicle is also reflected in the preamble to the agreement (at p 108 of the appeal record) which reads:

> Agreement made between Public Finance Bhd, a company incorporated in Malaysia and having its registered office at Tingkat Kelima, Wisma Perdana, Jalan Dungun, 50490 Kuala Lumpur, ('the owner', which expression shall where the content so admits include its successors and assigns) of the first part and the hirer named and described in Pt I of the Schedule hereto ('the hirer') of the second part.
>
> Whereby it is agreed as follows:
>
> '1 The owner will let and hire the goods ... '

Counsel contended that from the contents of the agreement, the appellants took the position that the payment of RM57,000 (as discussed earlier) by

the respondent is payment to themselves. He argued that Tan has now faded out of the picture and that this was exactly the position the secondhand car dealer was placed in *Ahmad Ismail v Malayan Motor Co & Anor* wherein Suffian FJ said that from the language of the hire-purchase agreement, the car dealer (in the instant case, it would be Tan) faded out of the picture and the contract that remained was between the plaintiff (in the instant case, the respondent) and the finance company (in the instant case, the appellants) and accordingly the plaintiff has no claim against the car dealer.

Counsel further argued that in the instant case there was total failure of consideration and that the respondent did not get what he bargained for. To support his contention he referred to the dicta in the case of *Goh Yew Chew & Anor v Soh Kian Tee* [1970] 1 MLJ 138 at p 141 where Ali FJ said:

> This principle or doctrine of failure was stated by Viscount Simon LC in *Fibrosa Spolka Akcvjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 in these words:
>
> > 'The claim of a party, who has paid money under a contract, to get the money back, on the ground that the consideration for which he paid it has totally failed, is not based on any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained. It is a claim to recover money to which the defendant has no further right because in the circumstances that have happened the money must be regarded as received to the plaintiff's use ... '

Counsel also referred to *Treitel on The Law of Contract* (7th Ed) at p 37 which defines 'total failure of consideration' as follows:

> A contracting party can recover back money paid under a contract if there is a 'total failure of consideration', ie if he has not got any part of what he bargained for.

Counsel contended that the letter of indemnity is invalid and unenforceable because it contravenes s 24(b) of the Contracts Act 1950 ('the Contracts Act') and s 34 of the Act. Section 24(b) of the Contracts Act reads:

> The consideration or object of an agreement is lawful, unless —
>
> ...
>
> (b) it is of such a nature that, if permitted, it would defeat any law;

The relevant paragraphs of s 34 of the Act provides:

> Any provision in any hire-purchase agreement whereby —
> (a) any right conferred on the hirer by this Act to determine a hire-purchase agreement is excluded or restricted;
> (b) the hirer is subject to any greater liability on the determination, in any manner whatsoever, of the hire-purchase agreement or of the bailment thereunder, than the liability to which he would be subject if the hire-purchase agreement were determined in accordance with this Act; or ...

A (g) except as expressly provided by this Act, the operation of any provision of this Act is excluded, modified or restricted,

shall be void and of no effect.

He argued that if the letter of indemnity is held to be valid, it will defeat s 7 of the Act. He pointed out that s 24(b) and s 34 of the Contracts Act B and the Act, respectively, were tied down in the letter of indemnity, which is part and parcel of the agreement and to circumvent the law, the appellants has asked the respondent to sign the letter of indemnity the contents of which indirectly contravenes those two sections referred to above. He argued that common law provides that when you sign a hire-purchase agreement, you must have title, and this common law principle has been C preserved by s 7(4) of the Act which provides that, 'Nothing in this section shall prejudice the operation of other written law or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement'. Counsel contended that the appellants must be in a position to transfer the vehicle at any time if the respondent decides to end the hiring by paying D the net balance due under the agreement.

He further argued that the contract has been frustrated when the vehicle was seized and that the parties must now be put back in their original position, viz the appellants must refund to the respondent all moneys already paid to the appellants. He then referred to ss 57(2) and 66 E of the Contracts Act which read:

Section 57(2)

A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act itself becomes impossible or unlawful.

F Section 66

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

G In his reply, counsel for the appellants argued that where you have an Act, you cannot import common law. Furthermore, although the position at common law has been preserved by s 7(4) of the Act, the letter of indemnity has excluded that common law position. He then again insisted that the letter of indemnity is not part of the agreement, and hence, is not caught by s 34 of the Act.

H

With respect, I cannot see how the above arguments forwarded by the appellants can hold water. The conduct and actions on the part of the appellants clearly show that when the agreement was entered into, the appellants has represented that they are the owners of the vehicle which, to me, would mean that they represented that they were capable of giving a I good title to the respondent whenever the latter decides to pay the net balance due which would then result in the hiring coming to an end — this has been agreed to under the agreement as is reflected in cl 8 (see p 109 of the appeal record) which reads:

> This agreement shall not be nor be construed to be a purchase or an agreement for the purchase of the goods by the hirer but if the hirer shall duly perform and observe all the stipulations and conditions in this agreement contained on his part to be performed and observed and shall in the manner aforesaid pay to the owner all sums of money payable to the owner by the hirer hereunder the hiring shall come to an end and the goods shall become the property of the hirer and owner will assign and make over all the owner's right benefit and interest in the same to the hirer but until all such payments as aforesaid shall have been made the goods shall remain the absolute property of the owner.

The evidence adduced at the trial, however, have shown that about six weeks after the agreement was executed, the vehicle was seized by the customs and since that seizure, the vehicle has not been returned to either the appellants or the respondent. The subject matter of the agreement is now in the possession of the customs and has not been returned, whereas in *Ahmad Ismail v Malayan Motor Co & Anor*, which was referred to by counsel for the appellants, the position was different. In that case, the police returned the vehicle upon finding that the vehicle was not in fact a stolen vehicle and as such, there could be no question that the title could not pass to the hirer at the time when the property was to pass. In the instant case, it would seem that the vehicle is now deemed to be forfeited by the customs pursuant to s 128(1) of the Customs Act. That being so, I am of the view that in accordance with s 57(2) of the Contracts Act, the agreement has become void as it would now be impossible for the appellants to assign and make over all its right, benefit and interest in the vehicle as they now have a defective title. When the appellants entered into the agreement, it stood in the shoes of Tan; they have received an advantage under the agreement, namely, the RM57,000 which the respondent has paid towards the purchase of the vehicle. Accordingly, since the agreement is now void as it would now be impossible for the appellants to pass a good title over the vehicle, I am of the view that they are bound, in accordance with s 66 of the Contracts Act, to return the RM57,000 which they have received from the respondent. I would think that upon these grounds alone that the respondent would be entitled to his claim.

However, the appellants have insisted that under s 7(1)(b) of the Act, the implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass only arise when the last instalment has been paid and not earlier. They also contended that s 7(1)(b) is not applicable as the vehicle is a second-hand vehicle and that be that as it may, that implied condition has been precluded by the undertaking given by the respondent in the letter of indemnity. They also argued that the position at common law, namely, that you look at the time when you enter into the hire-purchase agreement, is not applicable. The position at common law is best illustrated in the case of *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 KB 576; [1949] 1 All ER 711, wherein it was held that under a hire-purchase agreement, the warranty of ownership is given and becomes effective at the date of the agreement and not when final payment is made. In that case, the plaintiff (the hirer) entered into a hire-purchase agreement with the defendants in respect of

A a motor car. Under the agreement, a sum of £155 was paid by the plaintiff as an initial payment to the defendants, and the plaintiff agreed to take the vehicle on hire and to pay each month the sum of £9 18s, and when he had paid the requisite number of instalments, he was to pay another 1s and the car then became his property. He completed the monthly payments according to schedule and upon the final payment the car then ostensibly
B became his property. It appears, however, that, in fact, the car was not at any time the property of the defendants, although they legitimately believed that they were the owners of the vehicle when they entered into the hire-purchase agreement with the plaintiff. The vehicle was then handed to the rightful owner by the plaintiff. Consequently, the plaintiff sued the
C defendants for damages for breach of the agreement and in particular for damages for breach of express warranty that the defendants were the owners of the vehicle. The defendants contended that, in assessing damages for breach of warranty, an allowance should be made for the reasonable charge of hiring the car during the seven months in which the plaintiff has used it. Finnemore J held that no such allowance should be made and, in
D allowing the plaintiff's claim, said ([1949] 2 KB 576 at pp 579–580; [1949] 1 All ER 711 at p 713):

> ... when this agreement was entered into and an option to purchase was given, as from the moment when the hire-purchase agreement had been signed by the plaintiff he would have been entitled in law to have paid the
> E whole of the balance at once and had the ownership there and then vested in him.
>
> The defendants were clearly unable to give him the proper title at any moment from the time of the contract up to 22 April when the final payment was made by him and received by the defendants. It is plain that there was a breach of the agreement which continued throughout and that
> F the title for which the plaintiff had contracted was never given to him and could never have been given to him because it was never the defendants' to transfer ...
>
> The damage flowed from the fact that the defendants purported to hire and sell to him something which, although they did not know it, was not theirs to hire or to sell.

G

I think it is clear that s 7(4) of the Act has preserved the common law position, viz, the owner must have a good title to pass when he enters into a hire-purchase agreement. I cannot see any merit in the appellants' contention that the common law position is not applicable in the instant
H case on the basis that the vehicle is a second-hand vehicle and that such an implied condition can be excluded by the letter of indemnity. I would think that it cannot be disputed that the appellants have held themselves out to be the owners of the vehicle since 27 March 1991 when the agreement was executed and have represented that they are capable of giving a good title to the respondent whenever he might choose to end the
I hiring by paying the net balance due, upon that event occurring, the appellants have warranted, in cl 8, that the vehicle shall become the property of the respondent and that they will assign and make over their right, benefit and interest in the vehicle to the respondent. The evidence have, however, shown that the appellants were obviously incapable of

doing that from the time when they entered into the agreement. Under the circumstances, I cannot see any merit in the appellants' argument that there was no breach of s 7(1)(b) of the Act.

The appellants have insisted that the words 'at the time when the property is to pass' means only at the time when the last instalment has been paid according to the agreed schedule for payments and not before that. I disagree. It is my view that the phrase 'at the time when the property is to pass' means at the time when a hirer decides to pay all the sums due under a hire-purchase agreement and not necessarily only upon payment of the last instalment when it becomes due — in other words, at the time when a hirer exercises his option to purchase. A breach of s 7(1)(b) amounts to a breach of condition and it is a breach which goes to the root of the agreement which would entitle the hirer to recover the amount already paid by him. That is the position at common law and that is also the position under the Act, regardless of whether the goods are new or otherwise. In *Karflex Ltd v Poole* [1933] 2 KB 251; [1933] All ER Rep 40, the plaintiffs purchased a motor car from a man named King, who held himself out to be the owner of the car. Subsequently, by a hire-purchase agreement the plaintiffs, who described themselves as the owners of a motor car, agreed to hire it to the defendant on the terms that in consideration of an initial payment of £95 the defendant has the option to purchase it at any time during the currency of the agreement on making certain agreed payments. On the hirer falling into arrears with his monthly payments, the plaintiffs retook possession of the motor car and commenced an action to recover compensation. The defendant counterclaimed for repayment of the initial payment which he had paid to the plaintiffs on entering into the agreement as he could ascertain that at the date of the agreement the plaintiffs were not in fact the owners, the motor car having been sold to them by a person who had no title to it. The trial court dismissed the plaintiff's claim and gave judgment for the defendant on the counterclaim and the plaintiffs appealed. The appeal was dismissed. Acton J said ([1933] 2 KB 251 at p 261; [1933] All ER Rep 40 at p 48):

> The agreement throughout seems to me to be designed to express that the plaintiffs hold themselves out to be and are in fact the owners of this vehicle, and, in my view, it is impossible to resist the conclusion that, according to the true intention of the parties, the whole agreement was conditional upon the plaintiffs being the owners of the vehicle.

Goddard J said ([1933] 2 KB 251 at pp 262–263; [1933] All ER Rep 40 at p 50):

> I think myself that the judgment, both as to the claim and the counter-claim can, in the particular circumstances of this case, be supported as a matter of mere construction of the agreement. That, of course, is not a point of general application, but in this agreement the plaintiffs, who have no title to this car, are described throughout as the owners of the car. ... and they undertake in the agreement an obligation to pass the property in the car to the hirer at any moment after signing of the agreement when he chooses to pay the full amount of the purchase price, whether by means of instalments or by a lump sum, which he has an option of doing.

> In those circumstances, it seems to me that there is an express condition in this contract that the plaintiffs are the owners of the car. It is not a matter of warranty, it is a matter of condition. It must be, in my judgment, a condition that they are the owners of the car which they purport to deal with in this manner by hire-purchase. That would be sufficient to deal with the claim but, having listened to the argument of counsel for the plaintiffs, I think it desirable to say that where a person is letting out furniture or goods of any description on hire-purchase he does impliedly warrant, not that he will at some time become possessed of that property during the currency of the agreement, but that he is the owner of the property at the time when he lets it out.

In the instant case, the appellants, who claims and represented that they are the owner of the vehicle when they entered into the said agreement with the respondent, has later discovered that their title was defective. That, to me, is a breach of condition which goes to the root of the agreement so that upon such a breach, liability on the part of the respondent under the agreement comes to an end, and consequently he would be entitled to recover the amount paid by him to purchase the vehicle from the appellants who are now standing in Tan's shoes from the date of the agreement.

In arguing that the words 'at the time when the property is to pass' only arises when a hirer has made his last payment under a hire-purchase agreement, counsel for the appellants has referred to the case of *Ahmad Ismail v Malayan Motor Co & Anor* which according to him supports such a contention. I disagree. The facts there were different. In that case the police, who had earlier detained the motor car on suspicion that it has been stolen, has subsequently offered to return the vehicle subject to certain conditions but the hirer refused to accept the offer and terminated the hire-purchase agreement. The company later took possession of it subject to the conditions, but consequently the police cancelled the conditions. At the appeal stage in the High Court case of *Ahmad Ismail v Malayan Motor Co & Anor* [1973] 1 MLJ 117, Mohamed Azmi J said (at p 119):

> There is no evidence here that the finance company's title to the Morris car was defective in any way. In my judgment, the fact that the car was detained temporarily for purpose of police investigation on suspicion — which turned out to be unfounded — did not affect its title ... There can only be a breach of s 6(1)(b) of the Hire-Purchase Act if 'at the time when the property is to pass' the finance company had no right to sell the car to the plaintiff.

The police in that case were willing to return the vehicle to the hirer but he refused to accept it whereas in the instant case, the customs have confiscated the vehicle. There is no evidence to show that the customs were ready or willing to release the vehicle nor is there any evidence to show that the vehicle was subsequently released either to the appellants or respondent. However, counsel for the appellants has argued that no person was prosecuted for an offence under s 135(1)(d) of the Customs Act. Be that as it may, I am of the view that s 128(1) of the Customs Act would still entitle the customs to forfeit the vehicle notwithstanding that nobody was prosecuted, and thus the fact that nobody was prosecuted would be irrelevant under the circumstances.

Counsel for the appellants has also argued that any common law right which the respondent had, has been excluded by cl 4 of the agreement — he argued that cl 4 specifically excluded warranties in respect of second-hand vehicles. I cannot see any merit in that argument — from my reading, the Act does not seem to differentiate between new goods and second-hand goods as far as ownership is concerned or provide that the implied condition and warranties under s 7(1) do not apply to second-hand goods. Section 7(2) merely provides that an implied condition that the goods shall be of merchantable quality shall not be implied if the goods are second-hand goods, and that the agreement contains a statement to the effect that the goods are second-hand. The position is also similar in s 7(3) which provides that an implied condition that the goods shall be reasonably fit for a particular purpose which is made known to the owner or dealer shall not be implied if the goods are second-hand goods. It is clear that both subsections have nothing to do with ownership or title. Consequently, from my reading of cl 4 of the agreement, it only stipulates that the appellants 'gives no warranty whatsoever in respect of the goods as to description fitness, roadworthiness, repair, or otherwise other than in the case of new goods only those necessarily implied by the Act ...'. I fail to see how this clause has excluded any implied condition or warranty that the respondent has under s 7(1) of the Act. Clause 4 of the agreement has nothing to do with ownership, and this clause does not at all exclude any implied condition or warranty whether under the Act or at common law, and as to why counsel for the appellants has contended that cl 4 excludes the common law position as to title escapes me. In my view, the case of *Richards v Alliance Acceptance Co Ltd & Anor* cited by counsel for the appellants has no bearing upon the instant case. With respect, I do not even think that such an implied condition can be specifically excluded from a hire-purchase agreement. The agreement in the instant case, was conditional upon the appellants being the owner of the vehicle and the appellants have been described throughout as the owners of the vehicle. The agreement has obviously become impossible to perform if the appellants are found to have a defective title, and it becomes void when the appellants cannot pass a good title to the respondent unless at the end of the day, the appellants can prove that they have a good title throughout — this they have failed to do.

With regard to the letter of indemnity, I would tend to agree with counsel for the respondent that that document forms part and parcel of the agreement. The conduct of the appellants confirms this. DW1, an employee of the appellants who gave evidence, has agreed that the letter of indemnity forms part of the agreement, he explained that the letter of indemnity was prepared by the appellants and its purpose was to protect the appellant's interest. Counsel for the appellants has, however, argued that the letter of indemnity is independent of the agreement, and is only meant for second-hand vehicles. Furthermore, it did not contravene s 34(g) of the Act as that section only applies to a hire-purchase agreement and not to other documents. I fail to see any merit in such an argument. The appellants is pursuing his counterclaim based upon the letter of indemnity which to me would imply that he has tied up both the agreement and the letter of

indemnity together, and is making his counterclaim based upon these two documents read together. To me, the appellants seem to be taking the stand that it can make a claim against the respondent based upon the letter of indemnity as it is tied up with the agreement, but the respondent cannot raise any issue about the letter of indemnity in his defence against the counterclaim as that document does not form part of the agreement and that the document can preclude any implied condition or warranty provided under the Act, in other words, 'heads I win, tails you lose'.

I am of the view that the letter of indemnity is void. To me, it forms part of the agreement, but it has been worded as such to exclude the provisions of law which are implied under the Act. It is my finding that that document goes against the provisions of the Act which is meant to provide protection to hirers, and the document, being part and parcel of the agreement, is void under s 34(a), (b) and (g) of the Act. The right of the respondent to seek relief under the provisions of the Act and also at common law has been wrongfully precluded by that letter of indemnity. The agreement has become impossible to perform, and the respondent as hirer cannot now have and enjoy quiet possession of the vehicle, but that, to the appellants, seems to be irrelevant although it is clear that the agreement has been determined when the vehicle was seized by the customs and remained so until the trial. As far as the appellants is concerned, pursuant to the terms in the letter of indemnity, if the appellants loses the title whilst the respondent is still the hirer, the respondent cannot treat that as a failure of consideration and claim from the appellants what he has paid even though title was lost through no fault of the respondent, but the respondent must still pay what is due to the appellants even though the subject matter has gone. I cannot fathom such a stand. There clearly has been a total failure of consideration, and that being so, I cannot see how the appellants can claim that the implied condition as to title provided for under s 7(1)(b) of the Act is not applicable. In *Rowland v Divall* [1923] 2 KB 500, the plaintiff bought a motor car from the defendant and used it for several months. It then appeared that the defendant had had no title to it, and the plaintiff was compelled to surrender it to the true owner. The plaintiff sued the defendant to recover the purchase money that he had paid, as on a total failure of consideration. Atkin LJ said (at p 506):

> It seems to me that in this case there has been a total failure of consideration, that is to say that the buyer has not got any part of that for which he paid the purchase money. He paid the money in order that he might get the property, and he has not got it. It is true that the seller delivered to him the de facto possession, but the seller had not got the right to possession and consequently could not give it to the buyer.

He said (at p 507):

> The buyer accepted the car on the representation of the seller that he had a right to sell it, and inasmuch as the seller had no such right he is not entitled to say that the buyer has enjoyed a benefit under the contract. In fact the buyer has not received any part of that which he contracted to receive — namely, the property and right to possession — and, that being so, there has been a total failure of consideration.

In the instant case, when Tan sold the vehicle to the respondent, the former informed the appellants by letter (see p 102 of the appeal record) that he is the absolute owner of the vehicle, and that he is transferring all his rights, title and interest to the appellants. In the same letter, Tan also undertook to indemnify the appellants against all losses incurred in consequence resulting from the transaction and to refund all moneys should registration of the vehicle be refused by the registrar and inspector of motor vehicles for any reason whatsoever. A letter from the road transport department introduced in evidence (see p 93 of the appeal record) and dated 8 May 1991 reveals that the department was not in a position to register the transfer of ownership as the vehicle is under investigation in relation to falsification of documents. The appellants did not know that Tan had a defective title but that, to me, would be irrelevant. The appellants have since the date of the agreement represented that they are the owners of the vehicle, and if they cannot make good such a claim, the agreement has now become void.

The learned sessions court judge has found that the appellants' title was defective and hence the appellants were not able to transfer a good title to the respondent. She was also of the view that it was beyond the capacity of the respondent to give such an undertaking as found in the letter of indemnity since he can only rely upon what he sees, viz the vehicle and the relevant documents relating to ownership at the time he entered into the agreement with the appellants — he was not in a position to go behind that and investigate whether the vehicle was imported with valid and proper documentation. After having found that the agreement had been frustrated when the vehicle was seized, and that the appellants have breached the implied condition and warranties provided for under s 7(1) of the Act, she allowed the respondent's claim for RM57,000 with interest and costs and dismissed the appellants' counterclaim. I agree with her decision and that being so, this appeal is dismissed with costs.

Appeal dismissed.

Reported by Angela Ho